

Council/Agency Meeting Held: _____	City Clerk's Signature
Deferred/Continued to: _____	
<input type="checkbox"/> Approved <input type="checkbox"/> Conditionally Approved <input type="checkbox"/> Denied	
Council Meeting Date: May 16, 2005	Department ID Number: PL05-05

CITY OF HUNTINGTON BEACH REQUEST FOR CITY COUNCIL ACTION

SUBMITTED TO: HONORABLE MAYOR AND CITY COUNCIL MEMBERS
SUBMITTED BY: PENELOPE CULBRETH-GRAFT, City Administrator *[Signature]*
PREPARED BY: HOWARD ZELEFSKY, Director of Planning *[Signature]*
SUBJECT: APPROVE REIMBURSEMENT AGREEMENT BETWEEN THE CITY OF HUNTINGTON BEACH AND WL DIRECT HUNTINGTON BEACH, LLC FOR COSTS INCURRED FOR PROFESSIONAL PLANNING SERVICES IN CONNECTION WITH THE NEWLAND STREET RESIDENTIAL PROJECT

2005 MAY -14 PM 5:08
 RECEIVED
 CITY CLERK
 CITY OF
 HUNTINGTON BEACH, CA

Statement of Issue, Funding Source, Recommended Action, Alternative Action(s), Analysis, Environmental Status, Attachment(s)

Statement of Issue:

Transmitted for City Council's consideration is a Reimbursement Agreement between the City and WL Direct Huntington Beach, LLC. The Reimbursement Agreement will defray the costs of professional planning services associated with preparation of an environmental impact report for the Newland Street Residential project.

Funding Source:

The proposed Reimbursement Agreement between the City and WL Direct Huntington Beach, LLC requires the developer to defray the costs of professional planning services by making an initial deposit of Seventy-three Thousand Seven Hundred Ninety-Three Dollars (\$73,793.00) with the City. The remaining Two Hundred Thousand Dollars (\$200,000.00) is to be paid in quarterly payments by the developer until completion of the project.

Recommended Action:

Motion to:

"Approve the Reimbursement Agreement between the City and WL Direct Huntington Beach, LLC and authorize the Mayor and City Clerk to sign." *[Signature]*

E-5

REQUEST FOR ACTION

MEETING DATE: May 16, 2005

DEPARTMENT ID NUMBER: PL05-05

Alternative Action(s):

The City Council may make the following alternative motions:

1. "Deny the Reimbursement Agreement between the City and WL Direct Huntington Beach, LLC."
2. "Continue the item and direct staff accordingly."

Analysis:

In order to assist the development community on major projects involving the preparation of Environmental Impact Reports, it is necessary for the City to hire contract staff personnel to be responsible for all studies and documentation necessary to comply with the provisions of the California Environmental Quality Act (CEQA). In recognition of the costs associated with these services, WL Direct Huntington Beach, LLC, project proponent for the Newland Street Residential Project, has agreed to enter into a Reimbursement Agreement to defray the costs related to their project.

The agreement will reimburse the City \$273,793.00 for professional planning services. Initially, Seventy-three Thousand Seven Hundred Ninety-Three Dollars (\$73,793.00) will be paid to the City by WL Direct Huntington Beach, LLC, the project proponent, and the remaining Two Hundred Thousand Dollars (\$200,000.00) is to be paid in subsequent quarterly payments, as billed by the City, until completion of the project.

There have been many reimbursement agreements requested by staff and the development community. This is an acceptable method to give developers greater assurance of timely entitlement processing in the City of Huntington Beach. Staff recommends the City Council approve the reimbursement agreement.

Environmental Status:

Projects over which public agencies exercise ministerial authority, such as this reimbursement agreement, are categorically exempt from the California Environmental Quality Act pursuant to Section 15300.1.

Attachment(s):

City Clerk's Page Number	No.	Description
3	1.	Reimbursement Agreement between the City and WL Direct Huntington Beach, LLC.

RCA Author: Jane James/Mary Beth Broeren

ATTACHMENT 1

E-5.3

REIMBURSEMENT AGREEMENT BETWEEN THE
CITY OF HUNTINGTON BEACH AND
WL DIRECT HUNTINGTON BEACH, LLC
FOR COSTS INCURRED FOR PROFESSIONAL SERVICES

THIS AGREEMENT ("Agreement") is made and entered into by and between the City of Huntington Beach, a municipal corporation of the State of California, hereinafter referred to as "CITY," and WL DIRECT HUNTINGTON BEACH, LLC, hereinafter referred to as "DEVELOPER."

WHEREAS, DEVELOPER is proposing to develop an area within the City of Huntington Beach known as the Newland Street Residential Project (hereinafter referred to as the "Project"); and

DEVELOPER is required to submit applications to CITY for approval of various entitlements, applications, land use and subdivision approvals and environmental assessments related to the Project; and

DEVELOPER desires that all entitlements applications, land use approvals, and environmental assessments related to the Project be processed as soon as possible; and

DEVELOPER desires to have CITY commit sufficient resources to enable the expeditious processing of applications and other necessary documentation related to the Project; and

Pursuant to *California Government Code* Section 87103.6, DEVELOPER is allowed to defray the cost of processing development applications and entitlements review related to the Project by reimbursing CITY for such costs,

NOW, THEREFORE, in consideration of the promises and agreements hereinafter made and exchanged, the parties agree as follows:

E-5.4

1. PAYMENT

DEVELOPER agrees to reimburse CITY for a portion of its professional services related to the Project (the "Reimbursement Services") in the total amount of Two Hundred Seventy-three Thousand Seven Hundred Ninety-Three Dollars (\$273,793.00) (the "Reimbursement Amount") as follows:

A. Within ten (10) calendar days following approval of this Agreement by CITY, DEVELOPER will make an initial payment to CITY in the amount of Seventy-three Thousand Seven Hundred Ninety-Three Dollars (\$73,793.00) for the quarterly period of April 1, 2005 to and including June 30, 2005. Thereafter, beginning on July 1, 2005, and continuing on the first day of each third month thereafter, Developer will make payments to the CITY in the amount of Fifty Thousand Dollars (\$50,000.00) (the "Quarterly Payment"). The Quarterly Payments shall continue until the total Reimbursement Amount has been paid to CITY. Additionally, if the total amount deposited by DEVELOPER is reduced to less than Ten Thousand Dollars (\$10,000.00), DEVELOPER shall make the next Quarterly Payment within ten (10) days notice from CITY. DEVELOPER acknowledges that the Reimbursement Amount referenced in this Agreement is the CITY's best estimate of the cost of the Reimbursement Services described herein, and that the actual cost of the Reimbursement Services may be higher. In the event that the actual cost of the Reimbursement Services exceeds the estimated cost, DEVELOPER agrees to pay the actual cost within ten (10) days after receiving CITY's invoice for same. In the event the actual cost of the Reimbursement Services is less than the estimated cost, CITY will refund the difference between the actual and estimated cost.

B. A late payment fee of ten percent (10%) will be assessed if CITY receives any payment later than the thirtieth (30th) day after that payment is due but unpaid. In addition, one

E-5.5

and one-half percent (1½) interest per month shall be added for each month the payment hereunder is due but unpaid.

C. The estimated cost of the Reimbursement Services is Two Hundred Seventy-three Thousand Seven Hundred Ninety-Three Dollars (\$273,793.00).

2. STATEMENT OF INTENT

The amounts reimbursed to CITY pursuant to this Agreement will help defray CITY's cost of the professional planning, engineering, building, fire, and legal services required to process the Project.

3. EXCLUSIVE CONTROL BY CITY

CITY will maintain exclusive control over the work described herein. Nothing in this Agreement:

A. Shall be deemed to require CITY to approve the Project or any plan, proposal, suggestion, application or request submitted by DEVELOPER.

B. Shall be deemed to limit, in any respect whatsoever, CITY's sole authority to direct and control CITY staff and consultant(s) assigned to the Project.

C. Shall be deemed to impose any liability on CITY different from any liability as may otherwise be established by law.

4. TIME IS OF THE ESSENCE

CITY agrees that time is of the essence for the professional services to be funded pursuant to this Agreement.

5. TERMINATION OF AGREEMENT

Either party may terminate this Agreement at any time with or without cause, upon ten (10) days prior written notice to the other party. DEVELOPER shall be responsible for

E-5.6

all costs incurred prior to termination, including any and all costs incurred after notice of termination has been given.

6. TERM

This Agreement shall be effective as of the date it is approved and adopted by CITY. This Agreement shall expire when terminated as provided herein.

7. NOTICES

Any notices, certificates, or other communications hereunder shall be given either by personal delivery to DEVELOPER's agent (as designated in Section 1 hereinabove) or to CITY as the situation shall warrant, or by enclosing the same in a sealed envelope, postage prepaid, and depositing the same in the United States Postal Service, to the addresses specified below; provided that CITY and DEVELOPER, by notice given hereunder, may designate different addresses to which subsequent notices, certificates or other communications will be sent:

TO CITY:

City of Huntington Beach
ATTN: Director of Planning
2000 Main Street
Huntington Beach, CA 92648

TO DEVELOPER:

WL Direct Huntington Beach, LLC
Ms. Debra Pember
3121 Michelson Drive, Suite 200
Irvine, CA 92612

8. MODIFICATION

No waiver or modification of any language in this Agreement shall be valid unless in writing and duly executed by both parties.

9. SECTION HEADINGS

The titles, captions, section, paragraph and subject headings, and descriptive phrases at the beginning of the various sections in this Agreement are merely descriptive and are

E-5.7

included solely for convenience of reference only and are not representative of matters included or excluded from such provisions, and do not interpret, define, limit or describe, or construe the intent of the parties or affect the construction or interpretation of any provision of this Agreement.

10. INTERPRETATION OF THIS AGREEMENT

The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any of the parties. If any provision of this Agreement is held by an arbitrator or court of competent jurisdiction to be unenforceable, void, illegal or invalid, such holding shall not invalidate or affect the remaining covenants and provisions of this Agreement. No covenant or provision shall be deemed dependent upon any other unless so expressly provided here. As used in this Agreement, the masculine or neuter gender and singular or plural number shall be deemed to include the other whenever the context so indicates or requires. Nothing contained herein shall be construed so as to require the commission of any act contrary to law, and wherever there is any conflict between any provision contained herein and any present or future statute, law, ordinance or regulation contrary to which the parties have no right to contract, then the latter shall prevail, and the provision of this Agreement which is hereby affected shall be curtailed and limited only to the extent necessary to bring it within the requirements of the law.

11. DUPLICATE ORIGINAL

The original of this Agreement and one or more copies hereto have been prepared and signed in counterparts as duplicate originals, each of which so executed shall, irrespective of the date of its execution and delivery, be deemed an original. Each duplicate original shall be deemed an original instrument as against any party who has signed it.

E-5.8

12. IMMIGRATION

DEVELOPER shall be responsible for full compliance with the immigration and naturalization laws of the United States and shall, in particular, comply with the provisions of the *United States Code* regarding employment verification.

13. LEGAL SERVICES SUBCONTRACTING PROHIBITED

DEVELOPER and CITY agree that CITY is not liable for payment of any subcontractor work involving legal services, and that such legal services are expressly outside the scope of services contemplated hereunder. DEVELOPER understands that pursuant to Huntington Beach City Charter Section 309, the City Attorney is the exclusive legal counsel for CITY; and CITY shall not be liable for payment of any legal services expenses incurred by DEVELOPER.

14. HOLD HARMLESS

DEVELOPER hereby agrees to protect, defend, indemnify and hold harmless CITY, its officers, elected or appointed officials, employees, agents and volunteers from and against any and all claims, damages, losses, expenses, judgments, demands and defense costs (including, without limitation, costs and fees of litigation of every nature or liability of any kind or nature) arising out of or in connection with the Project, CITY'S processing or consideration of the Project, CITY'S ultimate approval or denial of the Project, DEVELOPER'S (or DEVELOPER'S subcontractors, if any) performance of this Agreement, or the failure to comply with any of the obligations contained in this Agreement by DEVELOPER, its officers, agents or employees, except such loss or damage which was caused by the sole negligence or willful misconduct of CITY. DEVELOPER will conduct all defense at its sole cost and expense and CITY shall approve selection of DEVELOPER'S counsel. This indemnity shall apply to all

E-5.9

claims and liability regardless of whether any insurance policies are applicable. The policy limits do not act as limitation upon the amount of indemnification to be provided by DEVELOPER.

15. ATTORNEY'S FEES

Except as expressly set forth in Section 8 of this Agreement, in the event suit is brought by either party to construe, interpret and/or enforce the terms and/or provisions of this Agreement or to secure the performance hereof, each party shall bear its own attorney's fees.

16. GOVERNING LAW

This Agreement shall be governed and construed in accordance with the laws of the State of California.

17. ENTIRETY

This Agreement, and the attached exhibits, contains the entire agreement between the parties respecting the subject matter of this Agreement and supersedes all prior understanding and agreements whether oral or in writing between the parties respecting the subject matter hereof.

REST OF PAGE INTENTIONALLY UNUSED

E-5.10

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed
by and through their authorized officers on _____, 2005.

WL DIRECT HUNTINGTON BEACH, LLC
(SEE ATTACHED SIGNATURE PAGE)

By: [Signature]

CITY OF HUNTINGTON BEACH, a
municipal corporation of the State of
California

AND

By: [Signature]

[Signature] (Hobbsman)
VICE PRESIDENT

REVIEWED AND APPROVED:

[Signature]
City Administrator

Mayor

City Clerk

APPROVED AS TO FORM:

[Signature] City Attorney
4/18/05
4/25/05
4/15/05

INITIATED AND APPROVED:

[Signature]
Director of Planning
4/25/05

E-5.11

WL DIRECT HUNTINGTON BEACH, LLC

BY :Direct Investors II, a California limited liability company

By: 

Kurt Nelson

It's Managing Members

By: 

Steve Schwartz

AND

WL Homes, LLC, a Delaware limited liability company

By: 

Jeff Hermann
VP Finance

E-5.12

Direct Investors II, LLC
3480 Torrance Blvd., Ste. 300
Torrance, CA 90503

April 22, 2005

Ms. Jane James, Senior Planner
City of Huntington Beach
2000 Main Street
Huntington Beach, CA 92648

Dear Jane,

As discussed, this letter is written to provide information and proper authorization for the signature block and signatories to the reimbursement and indemnity agreement concerning EIP's contract for preparation of the project EIR.

The project applicant and the guarantor/indemnitor for the subject agreement is WL Direct - Huntington Beach, LLC, a California Limited Liability Company ("WL - Direct"). The two Members of WL - Direct are themselves limited liability companies, being Direct Investors II, LLC, (the JCC Member) and WL Homes, LLC (the John Laing Member). Therefore, we provided a signature block to the subject agreement which had execution lines for both Members of WL Direct. Steve Schwartz and the undersigned, as co-Managing Members of Direct Investors II, LLC signed for that entity, and Mr. Jeff Herrmann executed on behalf of WL Homes, LLC.

I have enclosed for your records a copy of Article 5, Section 5.2 of the Operating Agreement for WL Direct, which sets forth the fact that the LLC shall have 2 Managers, being WL Homes, LLC and Direct Investors II, LLC, and that either Mr. Schwartz or the undersigned are the authorized parties to act on behalf of Direct Investors, LLC, and that Mr. Herrmann is one of 5 authorized parties to act on behalf of WL Homes, LLC.

I trust that you now have enough authorization information for the executed agreement concerning reimbursement and indemnity with respect to the EIP contract, and that the contract may be ratified by the City Council next month.

As always, thank you for your assistance, and please let me know if you need anything else in connection with the subject agreement.

Sincerely,



Kurt Nelson
Direct Investors II, LLC

cc Debra Pember

E-5.13

agreement to be executed by Mayer and DIRECT and shall be of no concern of the Company or WL except as expressly provided in this Agreement. Mayer shall bear all its own expenses incurred in connection with the development of the Property unless approved in writing in advance by the Manager. The Members hereby approves retaining Steven Kaufmann of the Richards Watson law firm to advise the Company on issues related to the Coastal Commission.

ARTICLE 5. MANAGEMENT OF THE COMPANY

5.1 Management of the Company by Manager.

5.1(a) Exclusive Management by Manager. The business, property and affairs of the Company shall be managed exclusively by the Manager. Except for situations in which the approval of the Members is expressly required by the Articles or this Agreement, the Manager shall have full, complete and exclusive authority, power, and discretion to manage and control the business, property and affairs of the Company, to make all decisions regarding those matters and to perform or cause to be performed any and all other acts or activities customary or incident to the management of the Company's business, property and affairs, including, but not limited to the financing, sale, lease or exchange of the Property.

5.1(b) Agency Authority of Manager. The Manager is authorized to endorse checks, drafts, and other evidences of indebtedness made payable to the order of the Company, and to sign contracts, documents, notices, letters, agreements and obligations on behalf of the Company.

5.2 Appointment of Manager.

5.2(a) Number and Qualifications. The Company shall have two (2) managers who initially shall be WL and DIRECT. WL's representatives authorized to act on behalf of WL as Member and as Manager shall be any of Steve Kabel, Ken Nishikawa, Jeffrey Herrmann, David Prolo, and Daniel Flynn. DIRECT's representatives authorized to act on behalf of DIRECT as Member and as Manager shall be any of Steve Schwartz and Kurt Nelson. As used herein, "Manager" shall mean DIRECT and WL acting jointly.

5.2(b) Resignation. DIRECT and WL may resign as Manager at any time by giving written notice to the Members without prejudice to the rights, if any, of the Company under any contract to which it is a party. Any such resignation shall take effect upon receipt of that notice or at such later time as shall be specified in the notice; and, unless otherwise specified in the notice, the acceptance of the resignation shall not be necessary to make it effective. Any such resignation of a Manager who is also a Member shall not affect the Member's rights as a Member and shall not constitute a withdrawal of a Member.

5.2(c) Removal. The Members shall not have the right to remove a Manager.

5.2(d) Vacancies. Any vacancy occurring for any reason in the position of Manager may be filled by the affirmative vote of both Members. No person who is not a Member, or a trustee of a Member, may be a Manager.

E - 5.14

**LLC Authorization of Direct Investors II, LLC,
a California Limited Liability Company**

We, the Undersigned, do hereby certify:

1) That we are the Managing Members of Direct Investors II, LLC a California limited liability company formed per Articles of Organization filed May 25, 2004 with the Calif. Secretary of State, a copy of which Articles are attached hereto;

2) That the following is a true and correct authorization adopted by us with respect to the LLC's becoming a Member of "WL Direct - Huntington Beach, LLC" and carrying out various duties and filings with respect to such Membership.

RESOLVED FURTHER: That it has been deemed in the best interests of the LLC to join with WL Homes, LLC, a Delaware Limited Liability Company, to form "WL Direct - Huntington Beach, LLC" a California limited liability company, for the purpose of investment in and entitlement of certain real property in the City of Huntington Beach, California, and;

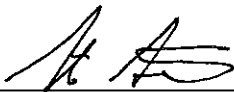
RESSOLVED FURTHER: That in order to conduct the business of WL Direct - Huntington Beach, LLC, it will be necessary to execute various documents required for the entitlement of the property to be developed, including without limitation, subdivision and other entitlement applications, bonds, notes, deeds of trust, guarantees of payment, indemnity(s) and other documents which shall be necessary from time to time to bind the LLC and all its Members; and,

RESOLVED FURTHER: That all necessary Member consents have been given for the authorization of Kurt Nelson and Steven Schwartz, as the Managing Members of Direct Investors II, LLC, to execute on the LLC's behalf any and all documents as are necessary to carry out the LLC's membership obligations as Member of WL Direct - Huntington Beach, LLC; and,

RESOLVED FURTHER, That such authorization has not been rescinded or amended.

Dated: April 22, 2005

Direct Investors II, LLC



Steven Schwartz, Managing Member



Kurt Nelson, Managing Member

E-5.15

**INTENTIONALLY
LEFT
BLANK**